

# A/E RISK REVIEW

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**FINANCE INSURANCE, LTD.**  
Quality Service For Your Insurance Needs

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## Communicate Early and Often

*The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.*

A great number of claims made against design professionals result not from technical errors or omissions in design, but from non-technical factors. In fact, a study of more than 17,000 closed claims published by the professional liability group of XL Insurance shows that non-technical factors contribute to approximately 70% of claims against design professionals. Leading among these nontechnical factors are communication failures, which were a contributing factor in 27% of claims.

This failure to communicate need not happen. You can anticipate and avoid many potential project upsets by correcting the factors that lead to miscommunication between design professionals, their clients and other members of the design and construction team. The need for effective communication starts early in the design process.

### The Negotiation Phase

Never overestimate a client's knowledge of the design services you provide. Just as John Q. Public may not fully understand the role of an architect, a civil engineer, a structural engineer and so on, your client may not clearly understand the scope of your professional services. It is your responsibility during the earliest stages of negotiation to explain to your client what you do as a design professional and – equally important – what you do *not* do.

It may be inconceivable to you that a client would expect you to design a perfect set of plans. Yet a client can easily assume you are responsible for delivering such perfection unless you have a frank and honest discussion regarding your scope of services.

Similarly, clients may feel you are responsible for specifying foolproof materials and systems that will never fail, even after the guarantees given by the equipment manufacturers have expired. They may allege in a claim that you were negligent in specifying a failed material, or that you should have personally tested the system before you specified it. Clear communication can make sure your clients have the information they need to understand your responsibilities and liabilities regarding specified materials and systems.

Clients, especially those new to the design and construction process, tend to get particularly upset when you add items to your specifications after the initial design and budget is accepted. They may perceive add-ons as a sign of incompetence or even an unscrupulous attempt to increase your fees and profits. They don't understand that your original estimates and specifications were based on your opinion of probable cost and fully within the legal standard of care. Your client needs to be educated to expect changes and budget revisions as a normal part of the design and construction process.

All of these issues need to be communicated clearly before you begin a new project. From the earliest conceptual stage, through the refinement of your work scope, through the negotiation of your contract, through the development of your final design and into construction, make sure you communicate every step of the way.

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Make sure this communication is two-way. Have your client explain his or her desires, needs and expectations. Discuss the client's ability to handle a few surprises along the way. Set up a formal communication channel so that any errors, omissions, changes, surprises and other perceived problems are dealt with swiftly and constructively, with the intent to fix the problem rather than fix the blame.

Similarly, make sure communication channels are open with the contractor, subconsultants and other parties important to the project. In fact, it's a good idea to invite all parties to a pre-construction meeting to review plans and procedures as well as clarify roles, expectations and methods of reaching problem resolution. It is really quite amazing how much a little open communication can do to get a project off to a smooth start and help get it back on track if a problem occurs.

### **The Formal Contract**

Every important issue that was discussed with your client during negotiations needs to be formalized in a written professional services contract. Discussing your areas of responsibility and limits of your liabilities is not enough. Even a hearty handshake won't do. Formalize your agreement in a written contract.

Work with your legal representation to draft a solid contract specifically written to reflect your practice and the particular project. You can start with recommended contract language provided by your industry associations. As your professional liability specialist, we can provide additional resources and assistance in helping you draft a fair and equitable contract.

If you are asked to sign a client-written contract, ensure it is thoroughly reviewed by your attorney. Again, we can provide advice as well, particularly regarding the insurability of the client's contract language. Any liability you agree to take on contractually for which you would not otherwise be responsible can be uninsurable.

### **Communicating During the Project**

Too often, once the professional service contracts are signed, communications diminish. Parties do not take the time to sit down and correspond on a regular basis over the life of the project.

To keep lines of communication open and encourage frequent feedback, schedule regular meetings with all key parties to the construction project. On large jobs, consider weekly project review sessions with representatives of the contractor, the client and the other design consultants involved. Smaller projects may not require such frequent formal meetings involving all parties, but regular communication is crucial nonetheless. These sessions can pinpoint design and construction problems before they become serious. They also foster solutions satisfactory to all involved parties.

Also plan weekly internal conferences among all key members of your staff working on a project. Have staff convey their progress since the previous meeting. List problems that need resolution and make requests for whatever information is necessary to solve them. Progress reports of this type serve as an effective diary of the project that can be reviewed after project completion – or when a project dispute arises.

Clients will find progress reports to be valuable as well. Reporting regularly to your client on the progress of their project can avoid surprises and form a bond of trust that will keep you and your client working together, even when adversity strikes. Nothing demonstrates a professional approach as effectively as well-planned, timely transmission of clear and honest information.

### **Put It In Writing**

Even when verbal communications are frequent, memory failure and misunderstanding can cost huge sums of money and precious time when disputes or litigation result. No one remembers all the details of telephone calls, group teleconferences or face-to-face conversations. It is important to record in writing all important information and decisions that concern or influence a project.

Memorialize meetings and telephone conversations with clients, subconsultants and contractors. Require that all discussions involving design decisions be documented by brief memoranda. Have clients formally approve such memoranda as accurate and complete. These memoranda and logs are particularly useful in the event of a dispute or claim. They are invaluable if there is a change in the project team and a new member

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needs to be brought up to speed with the current state of affairs.

It is a good idea to have all of your firm's written correspondence concerning projects or plans reviewed by a senior member of your firm – a project manager, department head or principal – before it is sent out to the client, contractor or other parties. An internal review provides a crosscheck to discover misstatements and avoid misunderstandings. For sensitive correspondence, a legal review by your attorney should be required as well.

### **Email and Other Electronic Communications**

It is amazing how email, text messaging and other electronic communications have taken the place of a phone call, a formal letter or a face-to-face conversation. While such technology has certainly been a boon for productivity, it can also be a bust when it comes to formal communication. Emails and text messages are easily forgotten, deleted, lost or ignored. We often assume someone has received an electronic message, but it may go unopened or otherwise be lost in cyberspace.

It's a good idea to formalize your company electronic communications policy. It should address not only email, but also extranets, chat rooms, text messaging, instant messaging, news groups, bulletin boards and any other electronic media being used. Make sure all employees are aware of and adhere to the policy.

Try to keep electronic correspondence regarding a project filed in an orderly manner within your computer. Back up all critical information sent by email on your network, in printed hard copy or on electronic media such as CDs. Use the "return receipt" email function that confirms your message has been received and opened. Follow up quickly when your electronic messages appear to be ignored, misdirected or lost.

### **Communication the Key**

It seems so obvious: clear communication is a vital key to a successful project void of disputes and claims. Yet at the root of litigation between design professionals, their clients and other parties to the design and construction process are misunderstandings based on the failure to communicate.

Effective communications should be a core competency of any design firm that strives to understand and meet the needs of its clients. A program of regular communication helps ensure the client understands the true scope and extent of your services. With expectations properly communicated, documented and verified, project upsets can be addressed quickly, calmly and effectively with minimal negative impact on time, costs, reputations and relationships.

### ***Can We Be of Assistance?***

*We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventatives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.*